BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-8306
File: 20-285453 Reg: 03056424

7-ELEVEN, INC., and JANIZEH CORPORATION, dba 7-Eleven # 13896
27761 Bouquet Canyon Road, Santa Clarita, CA 91305,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: May 5, 2005
Los Angeles, CA

ISSUED JULY 12, 2005

7-Eleven, Inc., and Janizeh Corporation, doing business as 7-Eleven # 13896 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 20 days for their clerk's sale of alcoholic beverages to a person under the age of 21 years, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Janizeh Corporation, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

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[1]The decision of the Department, dated June 24, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 12, 1993. On December 24, 2003, the Department instituted an accusation against appellants charging that, on October 17, 2003, appellants' employee, Michael Daly (the clerk), sold beer to Matthew Carberry (the minor), who was then 20 years old.

At the administrative hearing held on May 14, 2004, documentary evidence was received and testimony concerning the violation charged was presented by Carberry and by Department investigator Charlotte Clark. Martin Janizeh, the franchisee of the licensed premises, testified regarding store policies and training.

Carberry was apprehended as he left the premises with a 20-pack of Budweiser beer by undercover Department investigators who were there doing a compliance check. The minor admitted to the investigators that he was only 20 years old and told them that he had not shown the clerk any identification when purchasing the beer. Carberry was searched and two pieces of identification were discovered, one of which was a fake California driver's license bearing the minor's photograph and a date of birth that would make him 23 years old.

At the hearing, Carberry testified that he had purchased beer at the premises before and had never been asked for evidence of majority. He also testified that he had never used the fake ID, at appellants' premises or elsewhere, to purchase alcohol, although he carried it in his wallet. He said that he had purchased the fake California driver's license for about $50 a couple of years before this purchase.

The Department issued its decision which determined that the violation charged was proved and no defense was established. Appellants then filed this appeal contending that the minor was not credible. Appellants also filed a Motion to Augment

Record, requesting that a document entitled "Report of Hearing" be included in the administrative record, and asserted that the Department violated their due process rights when the attorney who represented the Department at the hearing before the administrative law judge (ALJ) provided a Report of Hearing to the Department's decision maker after the hearing, but before the Department issued its decision.

DISCUSSION

I

Appellants contend that the minor's testimony was not credible and the decision, which is based on the minor's testimony, does not comply with case law and the Administrative Procedure Act (APA).

The ALJ made the following findings regarding the minor's credibility (Findings of Fact 8 & 9):

> 8. Counsel for the respondents argue that the minor's testimony is not credible and should be disbelieved. The minor did in fact change his testimony with respect to the mode of payment for the beer purchase by initially testifying that he paid cash and later changing his testimony that he had paid by credit card. Counsel further argues that the minor's lack of memory as to the date he had procured his fake driver's license bears on his believability as a witness.
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> 9. The sinister motives that counsel attaches to the minor's change in testimony and failure to recollect is [sic] not supported by evidence in the record. It is found that the minor in good faith misrecollected the mode of payment for the beer and readily changed his testimony when he realized that the clerk had handed him a credit card receipt for the purchase. Nor does the minor's failure in memory have any bearing in this matter, as the fake identification was not an issue in the case.
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> Further, there is not a scintilla of evidence in the record to rebut the minor's version of events. The minor's testimony was internally consistent and credible.

The crux of appellants' argument on appeal is that Carberry's testimony is "completely undermined" by his testimony that he paid $50 for a fake ID, always carried

it in his wallet, did not buy it in order to purchase alcohol, and did not use the fake ID that night at appellants' premises. The decision is not supported by substantial evidence, appellants argue, because the ALJ did not "thoroughly explain" why he found Carberry's "farfetched testimony" to be credible. They cite the cases of *Holohan v. Massanari* (9th Cir. 2001) 246 F.3d 1195, and *McBail & Co. v. Solano County Local Agency Formation Com.* (1998) 62 Cal.App.4th 1223, 1228 [72 Cal.Rptr.2d 923], as well as Government Code section 11425.50, part of the APA, in support of their contention.

We begin our discussion with the general principle that it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

The Board has considered, and rejected, many times over, all the authorities cited by appellants. What the Board said in *Chevron Stations, Inc*. (2005) AB-8223 exemplifies its response to *Holohan v. Massanari*, *supra*:

> *Holohan v. Massan[a]ri, supra*, is a federal case stating a rule to be applied in administrative proceedings involving Social Security disability claims. The case holds that a claimant's testimony cannot be rejected without giving "clear and convincing reasons." It has no bearing on the issues in this case.

*(*Accord, *Lewis Salem, Inc.* (2003) AB-8054; *7-Eleven & Singh* (2002) AB-7792.)

The *McBail* case, *supra*, is not relevant to the present appeal or the contention for which it is cited. This case, too, has been rejected previously:

> Appellants also rely on the case of McBail & Co. v. Solano County Local Agency Formation Com. (1998) 62 Cal.App.4th 1223, 1227 [72 Cal.Rptr.2d 923], in which the appellate court remanded to the Local Agency Formation Commission its decision denying the plaintiffs' annexation petition. The court stated that the agency must articulate the basis for its decision in order for a reviewing court to apply the substantial evidence rule in a meaningful way. This case, however, is inapposite because it deals with a legislative act of an agency, not a judicial one, and it has nothing to do with the credibility of a witness.

(*7-Eleven & Singh* (2002) AB-7792; accord, *7-Eleven & Sandhu* (2002) AB-7810; *Prestige Stations, Inc.* (2002) AB-7767.)

Appellants also rely upon Government Code section 11425.50, which states, in pertinent part:

> If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

Once again, the Board has previously rejected that section as a basis for reversing a Department decision. In *Chuenmeersri* (2002) AB-7856, the Board explained:

> Section 11425.50 is silent as to the consequences which flow from an ALJ'S failure to articulate the factors mentioned.[2] However, we do not think that any failure to comply with the statute means the decision must be reversed. It is more reasonable to construe this provision as saying simply that a reviewing court may give greater weight to a credibility determination in which the ALJ discussed the evidence upon which he or she based the determination. We do not think it means the determination is entitled to no weight at all.

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[2]The Law Revision Commission Comments which accompany this section state that it adopts the rule of *Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474 [71 S.Ct. 456], requiring that the reviewing court weigh more heavily findings by the trier of fact (here, the administrative law judge) based upon observation of witnesses than findings based on other evidence.

Having reviewed the minor's testimony, we cannot say the ALJ's credibility determination was in any way unreasonable, and we find no fault in the ALJ's findings regarding credibility. Based on the minor's uncontradicted, credible testimony, substantial evidence exists to support the findings and determinations.

II

Appellants assert the Department violated their right to procedural due process when the attorney (the advocate) representing the Department at the hearing before the ALJ provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. Appellants also filed a Motion to Augment Record (the motion), requesting that the report provided to the Department's decision maker be made part of the record. The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the motions and issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").[2]

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief

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[2]The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615 [25 Cal.Rptr.3d 821]. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. (127 Cal.App.4th 615; ___ Cal.Rptr.3d ___). The Department petitioned the California Supreme Court for review, but the Court has not acted on the petition as of the date of this decision.

counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt*, *supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the ALJ had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellants at the hearing. Appellants

have not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellants have not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellants, it appears to us that appellants received the process that was due to them in this administrative proceeding. Under these circumstances, and with the potential for an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

Under the circumstances of this case and our disposition of the due process issue raised, appellants are not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no relevant purpose that would be served by the production of any post-hearing document. Appellants' motion is denied.

ORDER

The decision of the Department is affirmed.[3]

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.